The City of New York

POLICE DEPARTMENT

January 3, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Sergot Duplessy
Tax Registry No. 941690
Queens Court Section
Disciplinary Case No. 2010-2988

The above-named member of the Department appeared before the Court on September 7, 2011, charged with the following:

1. Police Officer Sergot Duplessy, on or about August 6, 2010, stated to Dr. Russell Miller, Medic[]al Division, that he was unable to drive a vehicle which, given subsequent observations of Police Officer Duplessy, was in fact false.

P.G. 203-10, Page 1, Paragraph 5 – CONDUCT PREJUDICIAL

2. Police Officer Sergot Duplessy, on or about August 10, 2010, was out of his residence while on sick report from approximately 1550 hours to 1740 hours without the permission of the Medical Division sick desk supervisor or his Department Surgeon.

P.G. 205-01, Page 2, Paragraph 4 REPORTING SICK

3. Police Officer Sergot Duplessy, on or about August 16, 2010, was out of his residence while on sick report from approximately 1530 hours to 1805 hours without the permission of the Medical Division sick desk supervisor or his Department Surgeon.

P.G. 205-01, Page 2, Paragraph 4 REPORTING SICK

4. Police Officer Sergot Duplessy, on or about August 17, 2010, having left his residence at 1518 hours to go to physical ther[]apy failed to go to therapy and was out of his residence while on sick report from approximately 1518 hours to 1805 hours without the permission of the Medical Division sick desk supervisor or his Department Surgeon.

P.G. 205-01, Page 2, Paragraph 4 REPORTING SICK
P.G. 203-10, Page 1, Paragraph 5 CONDUCT PREJUDICIAL

5. Police Officer Sergot Duplessy, on or about August 25, 2010, stated to Dr. Russell Miller and Lieutenant Dominick Valenti, Medic[]al Division, that he was unable to drive a vehicle which, given observations of Police Officer Duplessy, was in fact false.

P.G. 203-10, Page 1, Paragraph 5 CONDUCT PREJUDICIAL

6. Police Officer Sergot Duplessy, on or about September 10, 2010, stated to Dr. Russell Miller and Lieutenant Dominick Valenti, Medic[]al Division, that he was unable to drive a vehicle and took a cab to Medical Division which, given observations of Police Officer Duplessy, was in fact false.

P.G. 203-10, Page 1, Paragraph 5 CONDUCT PREJUDICIAL[1]

The Department was represented by Daniel Maurer, Esq., Department Advocate's Office. Respondent was represented by Michael Martinez, Esq., Worth, Longworth & London LLP.

Respondent, through his counsel, entered a plea of Not Guilty to Specification Nos. 1-3, 5 and 6. The Department moved to dismiss Specification No. 4. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification Nos. 1, 3 and 6. He is found Guilty in Part of Specification No. 5. He is found Not Guilty of Specification No. 2. Specification No. 4 is dismissed.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called District Surgeon Russell Miller, Sergeant Michael Hengel, Sergeant Margaret Roach and Lieutenant Dominick Valenti as witnesses.

[1] The charges and specifications were served in a format using all capital letters. They are presented here in standardized case.

District Surgeon Russell Miller

Miller had been a police surgeon for the Medical Division for seven-and-a-half years. He also had a private practice, specializing in orthopedic surgery. On May 11, 2010, Miller was assigned to the medical evaluation of Respondent. According to Miller, Respondent had suffered a sprain to his right ankle. He had an injury to the outer ligaments of his ankle. Specifically, he injured the front ligament, called the anterior talofibular ligament. At that point, Respondent had the ankle wrapped in an ace bandage, and was using a cane to help him walk. Shortly after their meeting, Miller cleared Respondent to return to limited duty. To the best of Miller's recollection, Respondent then returned to limited duty, until he went out sick "approximately a day later."

On August 6, 2010, Miller again examined Respondent. On that date, the doctor observed that Respondent was able to ambulate using a cane on his left side and a Cam walker on his right side. A Cam walker, Miller explained, is a removable plastic and metal brace that extends from the base of the toes to just below the knee. "[I]t has a hinge at the ankle and a thick rubber sole," and looks like a big boot.

Respondent told Miller that he "wasn't driving" and "goes places by cab." These were "[p]retty close . . . probably" to his exact words. Miller observed that Respondent's injured ankle showed no evidence of atrophy and his calves were equal in girth. There was tenderness over the front and outer sides of Respondent's right ankle. The lack of atrophy and size of the calves was significant to Miller. This was approximately four months after the injury, and Respondent had told Miller that he was "using the support except for when he was sleeping, and using the cane." Miller's clinical impression was that he was using the leg more than what he

had stated." There was also no mention of significant swelling. Respondent was able to move his foot within normal parameters.

On August 25, 2010, Miller again examined Respondent. According to his notes from that day, Respondent had a "persistent limp." The right calf was one quarter-inch less in girth than the left calf at four inches below the knees. There was tenderness over the lateral ligaments, as well as a "negative drawer sign." This was a test that involved holding the ankle stable and pulling the foot. If there was any shift, it would be a sign of instability. Here, there was no give. Respondent mentioned to the doctor that he was still not driving.

Miller also examined Respondent on September 10, 2010. On that date, Respondent had a stiff gait, and was still walking with the help of the Cam walker and the cane. Respondent told the doctor on that date that he was still unable to drive.

On cross-examination, Miller testified that while he used to perform surgeries, he had not done so in three or four years. He continued, however, to see patients through his private practice. He also had the authority to approve or disapprove of an officer's personal doctor.

In July 2010, Miller referred Respondent to another doctor, Person A, to clear up a discrepancy between two magnetic resonance imaging tests (MRI) that Respondent had in April and June 2010, respectively. Another doctor, Person B, had requested surgery for Respondent on the basis of those MRIs. Miller, however, was skeptical because the April request was so soon after the injury. Therefore, Miller denied the surgery request and sent Respondent to see Person A, one of the top ankle and foot surgeons in the city.

When Respondent went to see Person A, he also recommended surgery, but of a different type. Person B requested arthroscopic surgery of the ankle, which opens the area to get a better idea of the damage, but Person A viewed Respondent's radiology reports and performed an X-ray

computed tomography test (CT or CAT scan). After that, Person A felt that Respondent needed a debridement, which was cleaning out cartilage, and possible arthrodesis, a "fusion with regard to his ankle." Person A recommended a triple arthrodesis, signifying that the patient had very limited mobility in his ankle.

Despite PersonA's opinion, Miller maintained that Respondent was exaggerating his injuries when he examined him on August 6, 2010. Miller explained that he did not disagree with the assessment that Respondent needed surgery, just not on that initial date. He also believed that Respondent re-injured his ankle after April 2010 and did not notify the Department. The June 2010 MRI showed injuries that were not present on the April 2010 MRI. Thus, the witness reasoned, Respondent must have suffered an additional injury between the dates of the two MRIs.

Miller spoke to Lieutenant Dominick Valenti, commanding officer of the Absence Control and Investigations Unit (ACIU), about his suspicion that Respondent was exaggerating. Miller could not remember who approached whom. Miller admitted that someone from the Department might have come to him before his examination of Respondent to tell him that Respondent might be exaggerating his injuries. Miller made a notation in his examination notes that he suspected Respondent to be exaggerating his injuries. He also noted that Respondent was not driving himself at this time. The notes were written up from a scratch copy that was destroyed at the end of each day.

When examining patients with injuries to the right foot, Miller testified, he routinely asks the patient whether he is able to drive. He does this because the ability to drive will reflect the severity of the injury.

Miller stated that when he returned Respondent to duty, Respondent did not resist.

Miller last examined Respondent in July 2011. He testified that Respondent still had some issues with his ankle, and had arthroscopic surgery in January 2011. The arthroscopy was not just exploratory; cartilage was shaved down. At no point since his injury had Respondent returned to full duty. He was on restricted duty. In fact, Miller did not believe he was healthy enough to return to full duty. Respondent's movements were still restricted and he was unable to run.

Miller insisted that it would not have made a difference if the arthroscopy, which he ultimately authorized, had been performed earlier. The reason for this was that the first MRI did not show an injury to the superior talus. The talus is the bone below the calf bone, or tibia. The second MRI, which did show the injury, caused Miller to believe that surgery was necessary.

Miller described Respondent's prognosis as "guarded." The ankle was arthritic, as were the joints about the talus. These effects were permanent. Respondent "can function, but the level of function would probably not be normal." It was possible that Respondent might require further surgery, especially if his arthritis worsened over time.

Sergeant Michael Hengel

Hengel had been an investigator in ACIU for over eight years. On August 6, 2010, he was assigned to Respondent's case. Valenti instructed Hengel to observe Respondent. Valenti wanted to know whether Respondent had driven to the Medical Division at Lefrak City, when he had told Miller he was unable to drive.

Hengel testified that he observed Respondent walk slowly for several blocks after leaving Lefrak, looking behind him several times. He then walked across 57th Avenue and got into the

driver's seat of his personal vehicle. After a few minutes passed, he made a U-turn and drove eastbound on 57th Avenue. There was no one else in the car.

Hengel again observed Respondent on August 10, 2010. Respondent was assigned to a 0930x1805 tour on that date and was on sick report. On that date, Respondent left his home [redacted], at 1440 hours and drove to a physical therapy (PT) office on Queens Boulevard. No one else was with him. When he exited the vehicle on Queens Boulevard, Respondent was wearing a Cam boot on his right foot and was carrying a cane, although it did not appear to Hengel that he was using the cane to help him walk. At 1532 hours, Respondent left the PT office and made a U-turn in his vehicle on Queens Boulevard. Hengel returned back to Respondent's residence, arriving there at 1552. He remained until 1740, but never saw Respondent return. Hengel observed that Respondent should have been at his residence from 1532 to 1805 hours, unless he called the sick desk to request permission to go somewhere else. However, Respondent did not make any such requests for August 10, 2010.

Hengel stated that the time between 1530 and 1550 hours in Specification No. 3 accounted for travel time between the doctor's office and Respondent's home. Hengel left the Respondent's residence at 1740. Therefore, Respondent was out of residence without permission from at least 1550 to 1740 that day.

On September 10, 2010, Hengel again observed Respondent at his home. At 0600 hours, Respondent had an appointment with Miller. Respondent's vehicle, however, remained in the driveway at his residence until approximately 0710. At that point, Respondent drove past Hengel at a high rate of speed "towards the parkway to head to Lefrak." Though Hengel did not see Respondent enter his car, he did observe Respondent in the driver's seat. There did not appear to be any other passengers in the car.

Hengel lost sight of the officer on Hempstead Turnpike in the area of the Cross Island Parkway. Hengel continued to Lefrak and, at 0731 hours, observed Respondent on Junction Boulevard. Hengel followed him until Respondent parked his car on the corner of 57th Avenue and 97th Street. Though this location was five to six blocks from Lefrak, Respondent passed several available parking spots in order to park at that location. After parking, Respondent remained in his vehicle for two or three minutes before exiting. At that point, he was alone, had a boot on his right foot, and was carrying a cane. However, it did not appear that he was using the cane to aid his walking. Hengel also took a videotape of Respondent walking from his vehicle to Lefrak. This video was moved into evidence as Department's Exhibit (DX) 1.

On cross-examination, Hengel confirmed that according to Department rules, when Respondent was out sick, he had to stay home during the time that would be his regularly scheduled tour of duty. There was an exception to this rule, however: if the officer needed to go to PT during this time, especially if he had suffered a line of duty injury.

On August 10, 2010, when Hengel arrived at Respondent's home, he did not know whether Respondent was going to be there. When he saw Respondent pull out of the driveway, he did not know where the car was headed. Hengel did not know that Respondent was scheduled for PT on that day because officers were not required to tell the Medical Division in advance about attendance. There was an entry for that date in the out-of-residence log showing that Respondent left his residence at 1439 hours and returned at 2047 (Respondent's Exhibit [RX] A). Hengel noted that the PT sessions paid for by the Department lasted only 30 to 45 minutes.

Hengel believed that, during an official Department interview, "we asked the officer where he was, and he didn't recall where he went after the physical therapy." Hengel admitted that it was possible that Respondent had left and returned to the PT office after Hengel left the

area. Hengel admitted not checking whether the office kept records of when Respondent arrived and left.

Hengel testified that Valenti instructed him to observe Respondent because he had been out sick for several months and possibly was malingering. Hengel stated that Miller referred officers to Valenti on a regular basis because of suspicions of exaggeration. Hengel was instructed to observe whether Respondent drove, whether he wore the Cam boot, and whether he was using his cane. Every time that Hengel observed Respondent, he was wearing the boot and had his cane. Hengel admitted, however, that people could use canes in different ways when they are injured, and that he never spoke to Respondent about how he used his cane.

Hengel testified that the windows on Respondent's vehicle were tinted. He did not know whether Respondent was using his right or left foot to drive the car on August 6, 2010.

Upon questioning by the Court, Hengel confirmed that on September 10, 2010, he saw Respondent go past several metered spots before parking on 97th Street, although he did not recall whether the spot that Respondent eventually took was metered.

Sergeant Margaret Roach

Roach had worked for ACIU for over six years. She was instructed to investigate Respondent. On August 16, 2010, Roach was in the vicinity of Respondent's residence at approximately 1530 hours. She observed Respondent exiting his residence and entering the driver's seat of his vehicle. She attempted to follow Respondent, but lost him at Hempstead Turnpike. Respondent was alone in the driver's seat. He was walking without the help of a boot or a cane.

Roach testified that she observed Respondent's residence until approximately 1945 hours. He had not yet returned home. Respondent's tour of duty on that day was 0935x1805, and he did not have an entry in the out-of-residence log. Therefore, Roach stated, Respondent was out of residence without permission from 1530 until 1805 hours.

Upon cross-examination, Roach stated that she observed Respondent on other dates as well, and that these observations were conducted alone. On August 16, 2010, she arrived at Respondent's residence at about 1325 hours, on what was the first time she had visited. Prior to the visit, Roach was given Respondent's address and his Department of Motor Vehicles records, so that she would know what type of car to look for. Before August 16, 2010, Roach had never seen Respondent, except in pictures.

Roach asserted that she maintained a log with regard to her observation of Respondent, but she kept this log in her Department vehicle. She could not remember when she typed up her worksheet.

Roach testified that Respondent lived in a one-family unattached house. When facing the house, the driveway was on the right-hand side. On the day in question, Roach was parked approximately five houses down from Respondent, on the same side of the street. The driveway led to an unattached garage in the backyard, but his car was visible from where Roach was parked. The car was facing inward in the driveway, so Respondent had to back the car onto the road. Roach stated that Respondent's vehicle was about six steps away from the front of the house when Respondent got in.

Because the car drove in a direction away from Roach, she was not able to see Respondent actually driving. She admitted that from that distance, and from only seeing Respondent in pictures, she could not be certain that it was Respondent driving the vehicle.

Roach testified that on August 17, 2010, she observed an older male enter Respondent's residence. "[P]eople were going in and out on other dates." He was driving a late model Nissan. Those were the only two observations she made during those two dates.

Lieutenant Dominick Valenti

Valenti was the commanding officer of ACIU and had worked there for 11 years. On August 6, 2010, Miller told Valenti that he believed Respondent was exaggerating his injury. Miller asked if investigators could perform observations to check the extent of the injury. At that point, Respondent had been out for approximately four months with a sprained ankle.

On August 25, 2010, Valenti spoke to Respondent, who had just seen Miller. Respondent was walking with a noticeable limp and wearing a Cam walker on his right foot. Valenti asked how he had gotten to the doctor's office that day. Respondent replied that he had taken a cab. He did not say whether he was able to drive.

On September 10, 2010, Valenti again spoke to Respondent after he had seen Miller. Respondent had just been returned to duty from sick report, and was concerned about how he would get to work without driving. He indicated that he had taken a cab to see the doctor that day. But Valenti already had information that Hengel and Roach had observed him driving. This included the observation by Hengel that Respondent had driven to the Medical Division that morning. Valenti confronted Respondent with this information, but Respondent insisted that he had taken a cab. When Valenti "offered" to walk Respondent back to where he had parked his vehicle, Respondent "stopped talking and then he quickly changed the subject."

On cross-examination, Valenti admitted that if Respondent had driven with his left foot, which was not injured, that would not necessarily mean that he was exaggerating the injury to his right foot.

Valenti stated that he was familiar with Miller's note-taking, and that the doctor would sometimes write "AC" on the bottom left-hand corner of the sheet to signal a matter that should be brought to Valenti's attention.

Although Valenti had no medical training, he averred that "[y]ou normally don't see someone with a sprain out more than a couple of weeks." Respondent, however, claimed to be injured for four or five months, which created suspicion. Also, Miller had returned the officer to duty in May 2010, but Respondent reported sick again the very next day. He was not disciplined for this.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent, a five-year member of the Department, was assigned to the Queens Court Section and was on restricted duty. On April 4, 2010, while assigned to patrol in the 109 Precinct, Respondent suffered a line-of-duty injury to his right ankle. This occurred while responding to a dog fight assignment. He had to jump out of the way of a pit bull running at him and twisted his right ankle. Respondent could see it was a bad sprain because of the swelling. At the hospital, he was given crutches and pain medication.

A few days after his injury, Respondent saw his district surgeon and was referred to two private physicians. An MRI was performed and Respondent was advised that he might need surgery. He began wearing the Cam walker "a couple of months" after the pit bull incident.

On May 11, 2010, Respondent was seen by Miller. When Respondent said good morning to him, Miller did not answer but only "goes take off your . . . boot. All he did was like squeeze my foot. When I screamed, then he stopped." Miller measured Respondent's feet and said, "You still not driving." Respondent told him no.

From the time of his injury to the time he saw Miller, Respondent could not drive with his right foot. He could, and did, however, get around using his left foot. He agreed that he "primarily" got around this way, but also did so "[s]ometimes . . . in sort of emergencies." This was "pretty hard. It's kind of dangerous because like I can't – at first – now I am getting good at it, but at first . . . I didn't have real good control of the car." Respondent drove with his left foot because driving with his right foot was too painful. Also, the Cam walker could depress both pedals at the same time if the right foot was used. Respondent explained that he did not tell Miller that he was driving with his left foot because he did not want Miller to think that he was fit to drive.

Respondent's first doctor recommended surgery on his right foot. Miller would not approve it and referred Respondent to Person A. Person A told Respondent that he should have had surgery a long time ago. After Respondent's third request for surgery, Miller finally approved.

Following his surgery, Respondent went on sick report. While out sick, Respondent agreed that he was not allowed to leave his residence for the duration of his tour unless he received permission from the Medical Division. This included PT visits. For his PT,

Respondent went to two different locations. One of the offices was located on Queens Boulevard. Respondent said that even though he made appointments, he still had to wait over 30 minutes and sometimes more than two hours. Occasionally, while waiting to be seen, he would step out of the office and get something to drink or go to the bank. Further, Respondent's scheduled tour ended at 1805 hours. Because, on certain days, his PT ended after 1805 hours, he did not return home by then and did not contact the Medical Division about it. It was possible that this occurred on August 10, 2010.

With regard to August 16, 2010, Respondent said that the house that Roach described was not his house. He said that he did not have a garage. Additionally, he usually parked his car all the way toward the back of the driveway because he exited his house through the back door. This was because he lived in the basement and that was where his entry was. He testified that the people that lived in the rest of the house entered at the front. He later stated, however, that there was "just one" entrance "for the first floor and the basement." Additionally, when asked if the building was separated into apartments, Respondent answered, "It's like I don't think, no." One could get from the basement into the rest of the house, "but it's separate because they live upstairs."

Respondent stated that he allowed two of his friends to use his car. Sometimes they borrowed it because theirs were not working, and other times they used it to pick something up for Respondent.

Respondent maintained that he did not leave his house without getting permission from the Medical Division.

Respondent admitted lying to Valenti about taking a cab. He drove to the Medical Division using his left foot, but arrived late because he actually had been waiting for a cab that

never came. Also, Valenti was angry that his foot had not yet healed. Respondent lied because his "foot was messed up." He "didn't want the doctor to think I can use my foot, that it's good to go." Respondent was "frustrated with all the stuff [he] was going through." Miller already had denied his surgery twice and still wanted him to see Person A.

On September 10, 2010, Respondent could not find a parking spot, so he drove around the building a few times looking for parking.

Respondent said that according to his doctors, he needed screws placed in his ankle. The district surgeon told him that he would put in Respondent's retirement paperwork because he would not be able to get back to full duty.

On cross-examination, Respondent admitted that he used his left foot to drive on highways. He did not tell Miller that he drove because Miller already thought that Respondent was "faking" his injury. Respondent believed that Miller would place him back on full duty even though he was still in pain.

Respondent stated that on September 10, 2010, he parked approximately five blocks away from Lefrak because he could not find any closer parking. The empty parking spaces seen in the video were right across the street from where he parked.

FINDINGS AND ANALYSIS

Introduction

The charges here revolve around the accusation that Respondent was malingering after a line-of-duty injury. He sprained his right ankle after jumping out of the way of a pit bull and was placed on sick report. The district surgeon evaluated him and determined that his reports of continuing pain and immobility were suspicious. Respondent was referred to the Absence

Control and Investigations Unit. He allegedly told Medical Division personnel, on three occasions, that he was unable to drive a motor vehicle. On one of these occasions, the Department claimed, Respondent falsely stated that he had gotten to Lefrak City by taxicab. On two other occasions, Respondent allegedly was out of his residence without permission.

Specification Nos. 1, 5 & 6

It was not very much in dispute that Respondent denied his ability to drive to Miller, the district surgeon, on August 6, 2010 (Specification No. 1), to Miller on August 25, 2010 (Specification No. 5),[2] and to Miller and Valenti, the ACIU supervisor, on September 10, 2010 (Specification No. 6). The context and meaning were in dispute. Miller and Valenti testified that they asked Respondent specifically whether he was able to drive, and he said no. Respondent stated that Miller asked him only, "You still not driving?" during a terse physical examination. Respondent answered no. His reasoning, and position at trial, was that while he technically could drive, he was doing so with his left foot. This, and taxis, were his only viable method of getting from home to Lefrak, [redacted]. Miller and Valenti were really asking him whether he was fit for duty and were trying to assess whether he was able to drive a car. His ability to drive using his left foot was of no moment to them. Therefore, according to Respondent, his answer that he could not drive was just as true as if he told them that he could drive, but only with his left foot.

The Court rejects Respondent's reasoning. One of the duties of the Medical Division is to assess members of the service for fitness for duty. Another responsibility, however, is to determine if injured members might be malingering. Miller testified that he wrote a small

[2] Although the specification charges that Respondent told both Miller and Valenti on August 25, 2010, that he could not drive, Valenti stated that he only asked how Respondent got to the Medical Division that day and did not ask whether he could drive.

notation on certain evaluation forms so that Valenti would know which cases might be worthy of further review. It is important that such investigations take place because the Department, so generous with its sick leave policy for uniformed members, is entitled to strictly enforce the rules surrounding such leave. See *Case No. 84976/09*, signed Aug. 4, 2010, p. 5.

Thus, visits to Lefrak City are not the time to play semantics. By falsely stating that he was unable to drive, or even only that he was "not driving" at that time, Respondent heightened the suspicion around him because investigators observed that he was getting to the Medical Division by driving his own vehicle. His answers led to further investigation, including video surveillance.

This was not a situation where Respondent gave technically true answers but the district surgeon might have misinterpreted. For example, in Case No. 85472/09, signed January 26, 2011, the district surgeon wrote down that the member stated he was "unable" to drive, but the Department could not prove that the member said this, as opposed to his testimony that he only stated he had "difficulty" driving. In the instant matter, Respondent is demanding that the Medical Division should have interpreted his technically false answers as true in context. It was not enough for Respondent to assume that the district surgeon really was asking whether his right foot was able to operate the gas pedal. Cf. *Case No. 76568/00*, signed Dec. 28, 2001, p. 15 (rejecting member's claim that when he told surgeon he was driven to the Medical Division, he thought the doctor meant how he usually got there, or how he got around in general). All Respondent had to do to avoid embroiling himself and ACIU in a time-consuming investigation was to answer, "I can drive only by using my left foot."

Accordingly, Respondent is found Guilty of Specification No. 1, for his false answer on August 6, 2010. Because Specification No. 5 charges that on August 25, 2010, Respondent told

both Miller and Valenti that he could not drive, but the Department proved only that he told Miller this on that date, Respondent is found Guilty in Part of this specification.

Specification No. 6, concerning September 10, 2010, contains the additional charge that Respondent falsely told Miller and Valenti that he had arrived at Lefrak that day by taxicab. Respondent testified that he called from home for a cab but it never arrived. He decided to drive in his own vehicle using his left foot. He was observed driving by ACIU. When Valenti asked him, during or right after his examination by Miller, how he had gotten there, Respondent lied and said he had taken a cab. He did not want to get in trouble for being late, and did not want the Medical Division to think that he was able to drive and, thus, that his foot was okay.

The Court rejects Respondent's defense. He was asked a simple question and all it required was a simple answer. In any event, the Court fails to see how telling the truth about driving himself would have gotten him in any more trouble than being late. Of course, it had the potential for getting him into trouble for lying over the past several months about being able to drive. That is why Respondent kept up his deceit until Valenti threatened to walk him to where ACIU personnel had seen him park his car. Accordingly, Respondent is found Guilty of Specification No. 6.

Specification Nos. 2 & 3

Respondent is charged with being out of residence while sick on two occasions. In Specification No. 2, covering August 10, 2010, Hengel, an ACIU investigator, observed Respondent enter a physical therapy office, then leave about 10 to 15 minutes later at 1532 hours. Hengel did not see where he went. Hengel left and went back to Respondent's home, arriving at 1550 and staying until 1740. Because Respondent's tour that day ended at 1805

hours, and he was not observed back at his residence by that time, Respondent was charged with being out of residence without permission from the time Hengel did not see him there, 1550 to 1740.

Respondent testified that he went to that PT office on a regular basis. It was usually busy, and sometimes they told him to come back in a little while when he could be seen by the therapist. When this occurred, he would leave the office, get something to drink or go to the bank, and come back. He did not recall, however, whether that happened on the day in question.

The Court finds Respondent Not Guilty of Specification No. 2. What Hengel observed is not inconsistent with Respondent's reasonable explanation of what might have happened. Hengel did not stay to observe whether Respondent returned. No video surveillance was admitted into evidence, and Hengel admitted that he did not obtain sign-in or sign-out records of the PT office to determine exactly when Respondent was there. Moreover, the Department's case hinges on the unlikely circumstance that Respondent went to the PT appointment, had the session, and left, all within 10 to 15 minutes.

Specification No. 3 charges that Respondent was absent from his residence on August 16, 2010. This time, another ACIU investigator, Roach, conducted surveillance at Respondent's home. She observed Respondent leaving the front door of the home, get into his vehicle, and drive away. Again, his tour that day was scheduled to end at 1805 and he had not returned by that time.

Respondent testified that he could not have been observed exiting the front door of the house. He lived in the basement and the entrance to his apartment was in the back of the building. Moreover, he allowed two friends to use his car. These friends did not live with him, but they visited him sometimes and used his vehicle. Both friends were men of about the same

build, height, and "complexion" as Respondent. He contended that Roach confused one of them with him.

Yet Respondent also testified that there was only one entrance to the building, not a front door and a back door. He also testified that the basement and the rest of the house were not separate units, and that one could go into the rest of the house from the basement.

The Court cannot credit Respondent's utterly confusing testimony about the layout of his own home. Roach testified that she saw an individual leave from the front door. It looked like Respondent but she could not be certain. The Court has evaluated Roach's testimony and finds it credible. The Court finds Respondent's suggestion that the individual could have been one of his friends to be not credible. Thus, the Court concludes, by a preponderance of the evidence, that it is more likely than not that Roach observed Respondent exit his own home and get into his own car. Accordingly, Respondent is found Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of falsely stating to personnel of the Medical Division that he was unable to drive. He had a line-of-duty injury to his right ankle, which was not healing as quickly as the district surgeon, an orthopedist, determined it should have been healing. There also might have been a re-injury to the ankle. Respondent was asked, on three occasions,

whether he was able to drive or how he arrived at the Medical Division. Respondent answered that he could not drive, and on one occasion said that he had taken a cab. In fact, on several occasions, Respondent was observed driving his personal vehicle.

At trial, Respondent asserted that he was able to drive with his left foot. His defense to the charges was that by inquiring whether he could drive, the Medical Division was really asking only about his right foot. As the Court has noted, however, the Medical Division suspected Respondent at that time of malingering, so by their questions the investigators were also trying to determine Respondent's truthfulness. Asking him whether he could drive or how he got to Lefrak City was a measure of determining whether he was lying about the condition of his ankle. These questions were not, as counsel claimed, "little things that had nothing to [do] with his well being."

The investigators knew that Respondent had driven to Lefrak. By falsely claiming he had not, Respondent only furthered the investigation into his own actions. All of this could have been avoided by giving a simple answer that he could drive, with difficulty, using his left foot.

This case is not about whether Respondent has suffered a genuine injury. It appears that he has. At the time of the alleged incidents, however, the Medical Division was unsure of this, and Respondent's own actions only furthered their suspicion. Respondent admitted that he did not answer that while he could not drive the normal way he needed to as a police officer, he could, with difficulty, get around using his left foot. Instead, he lied and said he could not drive because he did not want the surgeon to think his foot "was good to go." In other words, he lied because he did not want to be returned to full duty. The Court is left with the conclusion that Respondent attempted to manipulate the system and retire as soon as possible by lying about his ability to drive.

Respondent has also been found Guilty of being out of residence without permission while on sick leave.

The Department argued for a penalty of 30 days to be served on suspension, forfeiture of an additional 15 vacation days, and placement on one year of dismissal probation. One reason that Respondent's counsel was opposed to probation was that Respondent is on sick leave and is not, because of his injury, expected to return to full duty. Because any probationary period would not start running until such a return, counsel said, there would be no point to having that as part of the penalty.

The Court disagrees with this view of the case. First of all, dismissal probation is supported by precedent. See, e.g., *Case No. 81454/05 et al.*, Oct. 11, 2010, Police Comm'r's mem., p. 3 (30 days and dismissal probation where "Respondent's misconduct and falsities subverted the Department's sick-leave and physical therapy-leave policies and reporting requirements. Such is highly prejudicial to the good order, efficiency or discipline of the Department."); *Case No. 83467/07*, June 5, 2009 (30 suspension days to be served, plus one year of dismissal probation, for using cane to exaggerate at Medical Division when surveillance showed she did not really need it). Moreover, even where the penalty contemplates that a member be separated from the Department in a vested-interest retirement agreement, dismissal probation can still be imposed. See, e.g., *Case No. 81370/05 et al.*, Oct. 2, 2008 (for, inter alia, being out of residence while sick and failing to cooperate with Department alcohol abuse counseling); *Case No. 83023/07 et al.*, Sept. 20, 2007 (for, inter alia, being out of residence, false records regarding whereabouts, and failing to report for psychological evaluation).

Respondent's "deceptive behavior, combined with [his] misleading statements" (see *83467/07*) warrants a heavy penalty. Accordingly, the Court recommends that Respondent be

DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that Respondent be suspended for 30 days and forfeit an additional 15 vacation days. See *Case No. 82722/07*, Aug. 19, 2009 (20-day suspension, 30 vacation days and dismissal probation for absence from residence on sick leave and falsely telling Medical Division about inability to walk or get around without a crutch); *Case No. 80050/04,* Jan. 24, 2005 (45 vacation days and dismissal probation for exaggerating injury by telling Department physician of inability to perform various tasks, like carrying bags or shoveling snow when, in fact, no inability existed).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
DEC 17 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER SERGOT DUPLESSY
TAX REGISTRY NO. 941690
DISCIPLINARY CASE NO. 2010-2988

In 2010, Respondent received an overall rating of 3.0 "Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2008 and 2009. In his five years of service, [redacted]. Respondent has no prior formal disciplinary history.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner – Trials